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No. 93-44

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLANT DANIELS CABLEVISION, INC.

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QUESTION PRESENTED

May the Congress, consistent with the First Amendment, make a content-based (but viewpoint-neutral) law that targets a private medium of communication and, over the owner's objection, selectively discriminates between "equally protected" speakers by mandating special distribution-enhancements for the messages of a preferred class of persons to the corresponding disadvantage of the other messages and speakers?

A subsidiary Question may be:

Whether this targeted restriction on expression and communicative activity, provided it is characterized as "economic regulation", may be justified pursuant to an interests-balancing analysis in the style of *United States v. O'Brien* and its progeny?

PARTIES TO THE PROCEEDING

A list of the parties to the proceeding in the district court is set forth in appellants' Jurisdictional Statement ii-iii. Daniels Cablevision, Inc., appellant here, was the plaintiff in the district court Civil Action No. 92-2292. The Rule 29.1 disclosure statement of Daniels Cablevision, Inc. is set forth in the Jurisdictional Statement Appendix 115a.

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BRIEF FOR APPELLANT DANIELS CABLEVISION, INC.

OPINION BELOW

The opinion of the three-judge United States District Court for the District of Columbia is reported at 819 F. Supp. 32 (D.D.C. 1993). It is reprinted in the Appendix to appellants' Jurisdictional Statement at 1a-72a.

JURISDICTION

The judgment of the district court was entered on April 8, 1993. Appellant Daniels Cablevision, Inc. ("Daniels") timely filed a notice of appeal in the district court on May 3, 1993. *See* J.S. App. 78a-79a.

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1253, which provides that "[e]xcept as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying . . . an interlocutory or permanent injunction in any civil action required by any Act of Congress to be heard and determined by a district court of three judges." Section 23 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 555(c)(1), requires that challenges to sections 4 and 5 of the Act "be heard by a district court of three judges convened pursuant to [28 U.S.C. § 1253]." Probable jurisdiction was noted by the Court September 28, 1993.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

Relevant provisions of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified in scattered section of 47 U.S.C.) ("Cable Act"), are reprinted in the Appendix to appellants' Jurisdictional Statement ("J.S. App.") at 82a-110a. This appeal challenges the constitutionality of sections 4 and 5 of the Cable Act, 47 U.S.C. §§ 534, 535, the so-called "must-carry" provisions (J.S. App. 88a-108a).

STATEMENT OF THE CASE

This case presents a challenge to the constitutionality of the must-carry provisions of the Cable Act on the single ground that the law, on its face, fatally

conflicts with the First Amendment to the U.S. Constitution. Daniels' claim below, and now here, is that the must-carry provisions of the statute, by their own terms, target and selectively restrain the conduct of constitutionally protected communicative activity by purposefully "abridging the freedom of speech, and of the press", U.S. Const. amend. I, as held by Daniels and by all other cable television operators. Daniels urges that the must-carry law may not constitutionally be applied or enforced relative to *any* cable television communication system. The "facts" supporting this proposition, and relied upon by Daniels, are apparent on the face of the must-carry statute. The three-judge court below, on motions and cross-motions for summary judgment and by a split decision, dismissed Daniels' First Amendment claims, denied its motion to enjoin the law, and declared the must-carry law facially constitutional.

INTRODUCTION AND SUMMARY OF ARGUMENT

Daniels is the owner and operator of a cable television system in San Diego, California, and is subject to the must-carry law. Cable television operators, including Daniels, engage in "speech" and are a part of the "press" within the context of the First Amendment. The purpose of the must-carry law is facially and selectively to supervise the content of fully protected expression circulated over a lawful vehicle of mass media communication and, thereby, to ensure that the messages of a select class of person, *vis-a-vis* other directly affected persons, are distributed on a prefereatial basis. The means chosen by the Congress to implement this objective are to restrict the editorial discretion of cable television operators over the format and content of those communications fur-

nished over the cable circuits, and substantively to discriminate between equally protected speakers. The must-carry law is, on its face, content-based and speaker-partial, and because it is exclusively and narrowly aimed at a component of the press, the law is subject to the most rigorous constitutional review.

Daniels advances two propositions of First Amendment jurisprudence, each independently demonstrating fundamental constitutional error in the judgment of the district court. First, content-based laws that, *on their face*, selectively target and purposefully restrict the conduct of protected "speech" and "press" activities are not subject to "rational basis" review. Second, *O'Brien*'s interests-balancing analysis, by its own terms, is inapposite to review of laws that *facially* confront the command of the First Amendment.[1] Daniels further shows that the must-carry law, which directly affects the exercise of "speech" and "press" liberties, results from a political environment that is, itself, inimical to the First Amendment.

The district court did not purport to justify the must-carry law in a fashion analogous to the "scarcity doctrine" as generally applied in cases involving the licensing of radio broadcasting stations under the public-interest standard of the Communications Act of 1934, as amended (47 U.S.C. §§ 151-613).[2] Nor

[1] *United States v. O'Brien*, 391 U.S. 367 (1968) ("*O'Brien*"). Daniels will further show that the *O'Brien* standard of First Amendment review has undergone no metamorphosis over the past 25 years, as suggested by the district court (J.S. App. 9a, 19a, 22a-23a), that would make it applicable to review of those laws that, on their face, implicate the First Amendment.

[2] *See Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 386-90 (1969); *id.* at 376 ("Without government control, the

did the court create or suggest any new standard of First Amendment review uniquely applicable to communication via closed-circuit cable television lines. Instead, the district court relied upon, but misconstrued and misused, traditional principles of First Amendment law to uphold the must-carry statute as facially constitutional.

ARGUMENT

I. THE MUST-CARRY LAW TARGETS THE CABLE TELEVISION COMPONENT OF THE PRESS AND SELECTIVELY RESTRICTS THE CONDUCT OF CONSTITUTIONALLY PROTECTED ACTIVITY OVER THAT MEDIUM OF MASS COMMUNICATION

Communication via cable television lines is an activity protected, at least in some measure, by the First Amendment.[3] The must-carry law is aimed

medium [of radio] would be of little use because of the cacophony of competing voices, none of which would be . . . heard (footnote omitted)); *National Broadcasting Co. v. United States*, 319 U.S. 190, 216-17, 226-27 (1943). The Court consistently has emphasized the narrowness of the scarcity doctrine, even in its unique application to the federal licensing of radio frequencies. *E.g., Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983) ("Our decisions have recognized that the special interest of the Federal Government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication" (footnote omitted)).

[3] *See, e.g., Leathers v. Medlock*, 111 S. Ct. 1438, 1442 (1991) ("cable television provides to its subscribers news, information, and entertainment . . . . It is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press' "); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986) (a cable operator

exclusively at the cable television element of the mass media press to purposefully restrict the exercise of communicative activity. On its face, the law affects content by selectively limiting the cable television operator's discretion to implement its own content-based judgments.[4] A particular class of speaker, *i.e.*, local broadcast station licensees, is created by the law and officially accorded substantive "speech" preferences over all other "equally protected" speakers. The purpose of the law is to ensure that the messages of the favored class of speaker are included within the content of those communications published via cable television circuits, and that those preferred messages are formatted and distributed in the officially prescribed manner. The statute, by its terms, establishes Government as the authority to mandate

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"exercise[s] editorial discretion [in deciding] which stations or programs to include in its repertoire"). *See also Preferred Communications*, 476 U.S. 495 ("We think that we may know more than we know now about . . . the present uses of the public utility poles and rights-of-way and how [the cable operator] proposes to install and maintain its facilities . . ."); *id.* at 496 (Blackmun, J., concurring) (Court's remand "leaves open the question of the proper standard for judging First Amendment challenges to a municipality's restriction of access to cable facilities"). Unlike that question before the Court in *Preferred*, the instant appeal involves an *ad hoc* law targeting and selectively restricting communicative activity.

[4] The district court found that the must-carry provisions "limit the freedom of cable operators to refuse to carry the signals of local broadcast stations . . .". (J.S. App. 3a.) *See also id.* at 5a ("Every commercial broadcast station having a right to mandatory carriage must be carried by the cable operator, at the station's election, on its current over-the-air channel position, [or] at the channel position it occupied on July 19, 1985, or . . . on January 1, 1992").

content over a private medium of mass communication, albeit in a "viewpoint-neutral" fashion.[5]

The legislative goal is directly achieved by (a) restraining the liberty of the cable operator to exercise content-based discretion over those communications circulated over its communications medium, and (b) infringing on the constitutionally guaranteed freedoms of those other, less favored speakers who seek to distribute their messages over the finite number of available cable television channels.[6] Under the

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[5] Daniels concedes that the content-based, speaker-partial law at issue is "viewpoint neutral" in the limited sense that the Government is not ostensibly engaged in dictating the particular content of any message. Nonetheless, the district court attached a relative value to the expression of the preferred class of speaker, finding that "Congress' solicitousness for local broadcasters' material simply rests on its assumption that they have as much to say of interest or value as the cable programmers . . . ." (J.S. App. 20a). This, in the lower court's view, is appropriate legislative action and all that is necessary for the Congress to create, and substantively favor, an elite class of First Amendment speaker at the direct expense of other speakers. We question whether legislatively established "speaker" classification geared to, for example, income levels, land ownership, educational credentials or, more apropos to the case at hand, ownership of other outlets of mass media communication—each "viewpoint neutral" in the identical sense as is the must-carry law—would be adjudged compatible with the First Amendment.

[6] *See, e.g., Quincy Cable TV, Inc. v. F.C.C.*, 768 F.2d 1434, 1441, 1451 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) ("Almost without exception, the must-carry rules only mandate carriage of [broadcast] signals that can already be picked up off the air" (footnote omitted)) ("Under the protective aegis of [must-carry] rules, local broadcasters are guaranteed the right to convey their messages . . . while cable programmers must vie for a proportionately diminished number of channels").

law, the broadcast licensee, already a privileged occupant of the public airwaves able to reach the masses with its messages and commercial announcements, is afforded a still greater, constitutionally unique privilege, an official speech preference *vis-a-vis* those other speakers who have not been awarded broadcast licenses and who must depend upon cable distribution to reach their audience.[7] Unless the cable operator carries the messages of the preferred class of speaker, and in the officially prescribed manner, it may not conduct its communications business at all.

Under First Amendment challenge, and on these undisputed facts, the must-carry law was justified by the district court as a rational exercise of legislative power (J.S. App. 13a (must carry "is simply industry-specific antitrust and fair trade practice regulatory legislation")). The court ruled that must carry was "essentially economic regulation", holding that the "provisions are, in intent as well as form, unrelated . . . to the content" of these messages distributed over the medium of cable television. *Id.*[8] The district court's central thesis is the determination that *ad hoc* laws that target the press, facially restrain communicative activity, substantively and selectively discriminate between speakers, and directly bear on the content of the communications in

[7] *See, e.g., Quincy Cable TV*, 768 F.2d at 1452-53 ("must-carry rules transfer control [of the cable system] to local broadcasters who already have a delivery mechanism granted by the government without cost and capable of bypassing the cable system altogether").

[8] *Cf. Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 790 (1988) (rejecting the "State's almost talismanic reliance" on the assertion that a law which selectively burdens speech is "simply an economic regulation").

question, need be "strictly scrutinized only if it appears that the government has prescribed the content—either the message or the subject matter of the speech to be spoken" (J.S. 16a; footnote omitted).

The court below held that a law mandating "[s]peaker partiality", unless it "is related to what the speakers are saying, is insufficient to trigger strict scrutiny" (J.S. App. 18a, footnote omitted). According to the district court, Government, consistent with the First Amendment, may (i) target purely communicative activity, (ii) countermand the communicative judgments and information offerings of those persons primarily engaged in the business of mass media expression, (iii) classify equally protected speakers, and (iv) selectively favor designated classifications over others, the lone proviso being that the restrictions are "content-neutral" (J.S. App. 19a) and deemed, on balance, to serve the public interest. In the district court's judgment, content-related restraints on the press avoid strict-scrutiny review if there is no intent by Congress to mold, or unduly influence, the viewpoint of the prescribed or proscribed message.[9] The essence of the court's ruling is that Congress, the First Amendment notwithstanding, is relatively free to make laws selectively intruding upon the "press" to burden or curb "speech"

[9] Under the lower court's theory, *The Washington Post* could be ordered, for example, to provide preferential space in its pages to persons on the basis of geographical distinction or to those persons holding governmental authorizations to express themselves via other vehicles of mass communication, and the only constitutional inquiry would be a subjective balancing of the given governmental interest in enacting the speech-restrictive regulation *vis-a-vis* the newspaper's interest in publishing free of the content-based intrusion.

activity, even to the extent of content-based supervision, and that such restrictions "are to be strictly scrutinized only if it appears that the government has prescribed the content—either the message or the subject matter—of the speech. . ." (J.S. App. 16a). That proposition—essential to the lower court's judgment—is unprecedented and in manifest error. *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 502 (1981) ("Government has legitimate interests in controlling the noncommunicative aspects of the medium . . . but the First and Fourteenth Amendments foreclose a similar interest in controlling the communicative aspects").

The district court reasoned that the targeted, content-based restrictions before it "will pass constitutional muster if they satisfy the criteria established in *O'Brien* and its progeny" (J.S. App. 15a), that the "record in support of the 1992 Cable Act . . . was made by Congress", and because "Federal Courts do not ordinarily review the adequacy of the record before Congress to support the laws it enacts" (*id.*), the must-carry law is presumptively constitutional. In sum, the court, reviewing a statute that it acknowledges "to limit the [speech] freedom of cable operators" (J.S. App. 3a), accepts at face value those "findings" made by the Congress to justify its conscious circumvention of the constraint by which the First Amendment limits legislative powers.[10] At

[10] *Cf. Sable Communications of California v. F.C.C.*, 492 U.S. 115, 129 (1989) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake" (citation and internal quotation marks omitted)); *Thomas v. Collins*, 323 U.S. 516, 530 (1945) ("the usual presumption supporting legislation is balanced by the preferred

the same time, the district court pays but scant attention to the command that constitutionally forecloses the legislature's foray into the specially guarded preserves of speech and press.[11] In that fashion, not only do legislators bootstrap themselves into making the very laws that the First Amendment forbids, but the "duty" of judges to review legislative enactments for constitutional infraction or consistency, as exclusively entrusted by Article III of the Constitution, is largely made a sham.[12] Under the lower court's rationale, the command of the First Amendment, if not altogether muted, is reduced to a less-than-binding advisory.[13]

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place given in our schemes to the great, the indispensible democratic freedoms secured by the First Amendment").

[11] *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) ("The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time be passed by those intended to be restrained?").

[12] *Cf. Marbury*, 5 U.S. (1 Cranch) at 180 ("the particular phraseology of the constitution . . . confirms and strengthens the principle . . . that a law repugnant to the constitution is void; and that courts . . . are bound by that instrument"). *See also id.* at 177-178 ("It is emphatically the province and duty of the judicial department to say what the law is . . . [and it is] the constitution [that] must govern"). Yet the court below is openly hesitant even to question the relevant "findings" of the Congress (J.S. App. 15a).

[13] *Cf. Houchins v. KQED, Inc.*, 438 U.S. 1, 13 (1978) (courts "must not confuse what is 'good,' 'desirable,' or 'expedient' with what is constitutionally commanded by the First Amendment. To do so is to trivialize constitutional adjudication"). *See also West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943), ("Freedoms of speech and of the

The one reality that the Court, above all else, must recognize here is that a particular component of the press, television broadcasting as an industry, using its considerable tools to shape public opinion and influence elective politics, has persuaded a legislative body affirmatively to enhance its communicative and commercial interests by correspondingly diminishing the constitutionally guaranteed freedoms of other "equally protected' speakers and "press" outlets. For whatever Congress' motivation or rationale, the must-carry law purposefully abridges the freedoms of speech and press of some of the people for the special benefit of those who so ably lobbied its enactment.[14]

In *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943), this Court said: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy,

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press . . . may . . . be infringed only to prevent grave and immediate danger to interests which the state may lawfully protect").

[14] Does the nation need, or want, a political system in which Government, with relative impunity, may economically reward or punish the various factions of the press, and in which those interests are continuously beholden to the political establishment, either to perpetuate their commercial advantages or to mitigate the relevant burdens? *Cf. Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring) ("Recognizing the occasional tyrannies of governing majorities, [the Framers] amended the Constitution so that free speech . . . should be guaranteed"). Is the tenor of the First Amendment to maintain an independent, "vigilant and courageous press", *Near v. Minnesota*, 283 U.S. 697, 720 (1931), or a press that is subservient and readily intimidated into "self-censorship" as the best course of doing business? *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757-58 (1988).

to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." The history of the must-carry controversy belies this fundamental teaching.[15] The must-carry regime grew out of a classic political confrontation over "turf" waged between influential industry trade associations, their respective "PACs" and their "Hill" lobbyists.[16] Must carry is about dollars, special interests and, most of all, the effective use of political power, all of which would be "business as usual", *except* for one crucial fact: the victors' spoils have *facially* taken shape as a legislative restraint on the losers' exercise of their constitutionally guaranteed freedoms of speech and press.[17]

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[15] For the 30-year history of must-carry regulation, *see Quincy Cable TV*, 768 F.2d at 1439-1445; *see also Century Communications Corp. v. F.C.C.*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988); *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 45 n.80 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977).

[16] *See, e.g.*, Sheila Kaplan, *Lobby Talk, Cable Bill Mobilizes Lobbyists*, Legal Times of Wash., Sept. 21, 1992, at 5. None of this is to fault any person or industry group. Indeed, all have been playing in the same game, some more productively than others. Its relevance here is only to show that the Congress has been "persuaded", the Constitution notwithstanding, to enhance the stature and commercial interests of some speakers by abridging the constitutionally guaranteed freedoms of others.

[17] The politics of must carry are well documented. *See, e.g.*, Jeannine Aversa, *League Offers Carriage Bill, But No Endorsement*, Multichannel News, Apr. 2, 1990, at 3 ("The bill . . . was hatched out of a proposal created by the National Association of Broadcasters . . . . [It] has been dubbed 'if carry, must pay,' and is supported by the Association of Independent Television Stations"); *NAB to Push for Manda-*

This overt politicalization of "speech" liberties notwithstanding, the district court insists that the must-carry law, if it implicates the First Amendment at all, does so only in the most minimal or insignificant manner (J.S. App. 13a, 20a, 28a). The concurring opinion in the split decision below (Sporkin, D.J., concurring (J.S. App. 36a)) actually chastises the cable operator and programmer plaintiffs there (appellants here) for even mounting their constitutional challenges to the must-carry law. *Id.* at 42a ("Plaintiffs have come before this Court, not because their

tory Retransmission Fees, Communications Daily, Jan. 17, 1990, at 8 ("Comm. Dly."); *id.* at 9 ("Attention of Congress 'is beginning to be riveted' on regulation of cable, said Rep. Tauzin (D-La.) . . . at NAB legislative forum . . ."); *Broadcasters Unite on If-Carry/Must-Pay Plan to be Sent to Inouye for Introduction*, Comm. Dly., March 26, 1990, at 1; *The Inside-Outside World of CBS's Jay Kriegel*, Broadcasting, Apr. 2, 1990, at 44 ("If broadcasters succeed in winning must pay, Larry Tisch's right-hand man will get major credit; he's become a major force in company, in industry, and in Washington"); *Face-Off On Must Pay*, Broadcasting, Apr. 2, 1990, at 43 ("CBS President Laurence Tisch was on Capitol Hill last week plugging the [if carry/must pay] legislation"); *Tempus Fugit for Must-Carry/Retransmission Legislation*, Broadcasting, May 4, 1992, at 4 ("Washington broadcasting industry lobbyists are still confident of final enactment of cable bill with must-carry/retransmission consent"); Ann Devory, *Gore Slams President on Cable TV Bill*, Wash. Post, Sept. 29, 1992, at A6. *See also* Paul Farhi, *Foes of Cable Bill Outspend Its Supporters*, Wash. Post, Sept. 22, 1990, at D1. None of the foregoing is intended to demonstrate the truth or falsity of these press reports but only to show the general political climate in which the must-carry legislation was conceived, debated and enacted. To say that the "speech" liberties of cable operators and programmers have suffered "the vicissitudes of political controversy", *Barnette*, *supra*, is grossly to understate the premise.

freedom of speech is seriously threatened, but because their profits are; to dress up their complaint in First Amendment garb demeans the principles for which the First Amendment stands . . .").[18]

The court below has simply overlooked or ignored the substance of the must-carry law, especially in its overt classification of, and discrimination among, speakers. Daniels is unaware of any other court that knowingly has endorsed a legislative scheme that, on its face, is content-based and feudalizes the rights of "equally protected" speakers by extending the "guaranteed" freedom to a privileged class and diminishing it for others.

II. THE MUST-CARRY LAW, BECAUSE IT TARGETS "SPEECH" AND "PRESS" ACTIVITY AND PURPOSEFULLY RESTRICTS THE EXERCISE OF THOSE CONSTITUTIONALLY GUARANTEED LIBERTIES, IS NOT SUSTAINABLE UNDER THE RULE OF RATIONALITY

In a mode substantially similar to that of other publishers and editors in the complex of mass-media communications, cable television operators (unlike "soda vendors") are primarily involved "in the business of expression". *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 761 (1988).[19] That fact, alone, constitutionally distinguishes the permissible regulation of their business from that of persons whose principal vocation is *not* "expression."

[18] This gratuitous characterization is all the more extraordinary in light of the D.C. Circuit's prior rulings in *Quincy Cable TV*, 768 F.2d 1434, and *Century Communications Corp. v. F.C.C.*, 835 F.2d 292, 298 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1632 (1988), each of which struck down previous administrative versions of the must-carry regime as unconstitutional.

[19] *See also supra* n.3.

Id. For example, while a manufacturing business or telephone utility may generally be subjected to rational-basis regulation, the press is not fair game for the legislature's targeted supervision. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943) ("The right of a State to regulate, for example, a public utility may well include . . . power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press . . . may not be infringed on such slender grounds"); *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 120 (1973) (there is a "basic distinction" between selective regulation of the communications media and a "utility that itself derives no protection from the First Amendment").[20] Far more intrusive than that ordinance at issue in *City of Lakewood*—which involved only the licensing of a limited few newspaper vending boxes on public property—the must-carry law is "directed narrowly and specifically at expression or conduct commonly associated with expression: the circulation of [speech]". *City of Lakewood*, 486 U.S. at 760-61.[21] As such, the must-carry restraint, at a minimum, is subject to facial First Amendment challenge. *Id.* at 755-57.[22]

[20] *See also* 47 U.S.C. § 541(c) ("any cable system shall not be subject to regulation as a common carrier or utility").

[21] In *City of Lakewood*, the newspaper publisher was hardly prohibited, or even meaningfully inhibited, from distribution of, or control over, its publication by the ordinance there in question. Here, failure by the cable operator to adhere to the content-based restrictions in the must-carry law would result in termination of the cable television business.

[22] The licensing ordinance before the Court in *City of Lakewood* raised no content-based implications nor did the record there contain any evidence or suggestion of an effort by public officials to use the ordinance in a content-related fashion. Nonetheless, the Court struck down the ordinance as facially unconstitutional because it possibly could "intimidate[] parties into censoring their own speech". *City of Lakewood*, 486 U.S. at 757. In the case of the must-carry law, the content-based nature of the restriction is self-evident.

Nearly 60 years ago in *Nebbia v. New York*, 291 U.S. 502 (1934), this Court, rejecting constitutional claims, upheld the right of the state to fix prices for the sale of milk. The "power [of government] to promote the general welfare is inherent", 291 U.S. at 524, "except in so far as it has been restricted by the Constitution of the United States." *Id.* This long-established principle was recently, and unanimously, reiterated in *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791, 2806-07 (1992), where the Court said:

> It is conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other. That theorem, however, assumes a state of affairs in which the choice does not intrude upon a protected liberty (citations omitted).[23]

In the instant case, the lower court sees no difference between the regulation of milk production or other similarly unprotected activities, and a content-based law that targets a part of the press to selectively restrict speech-related activity and mandate content (*i.e.*, must carry). *See, e.g.*, J.S. App. 12a-13a. The

[23] *See also Planned Parenthood*, 112 S.Ct. at 2874 (Scalia, J., concurring in the judgment in part and dissenting in part) (joining in the above-quoted passage and observing that "[t]he issue [then] is whether [the law under review intrudes on] a liberty protected by the Constitution").

difference, of course, is that the latter, on its face, "intrude[s] upon a protected liberty", *Planned Parenthood, supra*, while the former does not. While so-called "industry specific" regulation generally enjoys wide acceptance, that label is not license for the *ad hoc* supervision of speech or the press. *See infra* 21-22.

A cable television operator is in no manner immunized by the First Amendment from governmental supervision. Most certainly, its business and other activities, including those of a communicative character, are comprehensively subject to the generally applicable laws, even when the particular regulation in question may limit the exercise of "speech" freedoms or inhibit "press" activity. *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2518 (1991) ("generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news"); *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937) ("The publisher of a newspaper has no special immunity from the application of general laws"); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (upholding application of the general antitrust laws to the press on ground that the "First Amendment affords not the slightest support for the contention that a combination [in restraint of trade] has any constitutional immunity").

At the same time, however, the media of mass communication are constitutionally afforded protection from *ad hoc* regulations "that single out the press" for imposition of special restrictions or burdens. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Rev.*, 460 U.S. 575, 585, 592 (1983); *accord Grosjean v. American Press Co.*, 297 U.S. 233, 250-51

(1936); *Leathers*, 111 S. Ct. at 1442; *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991).[24] Especially offensive to the First Amendment is any law selectively aimed at the press and imposing, or even creating the possibility for, content-based supervision. *Leathers*, 111 S. Ct. at 1442-43. Whenever regulations target "speech" or "press" activity and, as is the case with the must-carry law, facially and purposefully impact on the content-related judgments and practices of editors or speakers, the scheme consistently has been declared unconstitutional.[25]

If, as the Court has held, a "tax" selectively applied to the press presumptively conflicts with the First Amendment, *Minneapolis Star & Tribune Co.*, 460 U.S. 575; *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), then an *ad hoc* law that targets

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[24] *See also Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (The "liberty of the press is not confined to newspapers and periodicals" but rather pertains to "every sort of publication which affords a vehicle of information and opinion"); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (First Amendment protects "not only the right to utter or to print, but the right to distribute [and] the right to receive"); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952) (The "basic principles of freedom of speech and the press, like the First Amendment's command, do not vary"); *Quincy Cable TV*, 768 F.2d at 1448 ("the core values of the First Amendment clearly transcend the particular details of the various vehicles through the messages are conveyed").

[25] *See, e.g., Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), where professional fundraisers are accorded substantially more protection from content-based regulation of their solicitations, even in the face of "fraud" allegations, than the district court would afford the cable television component of the press. *See also id.* at 791, 795-97, and cases cited therein.

one component of the press to purposefully limit the communicative judgments and distribution practices of private editors is, at minimum, highly suspect.[26] At the very least, the tax law starts out on the right foot, U.S. Const. art. I, § 8, cl. 1 ("The Congress shall have Power to lay and collect Taxes"), while the must-carry restraint, out of the starting gate, collides with the constitutional command that Congress "make no law . . . abridging the freedom of speech, or of the press". A "tax" statute that targets the press implicates the First Amendment *only* because it implies a legislative motive, or creates the opportunity, to affect content. In contrast, must carry "is directed narrowly and specifically at expression or conduct commonly associated with expression: the circulation of [protected speech]", *City of Lakewood*, 486 U.S. at 760. It imposes, on its face, a content-based condition on the flow of fully protected communications over a private medium of expression. Far more than that licensing ordinance at issue in *City of Lakewood*, these "two features . . ., at least in combination, justify

[26] *See Leathers*, 111 S. Ct. 1438, where the Court sustained, against First Amendment challenge, Arkansas' "tax of general applicability" because the State had not "targeted cable television in a purposeful attempt to interfere with its First Amendment activities". *Id.* at 1444. In contrast, the must-carry law, whatever its legislative motive and however labeled (*e.g.*, "consumer protection" or "economic regulation"), is a highly focused, "purposeful attempt to interfere with [a cable operator's] First Amendment activities". *Id.* Yet, the decision below (J.S. App. 18a, n.22) urges the proposition that while tax assessments targeting the press must be strictly scrutinized, the must-carry law, content-based on its face, avoids that demanding examination.

the allowance of a facial [First Amendment] challenge". *Id.* at 759.[27]

Just this past term, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217 (1993), the Court reiterated the familiar principle that a "law burdening religious practice [protected by the First Amendment] that is not neutral or not of general application must undergo the most rigorous of scrutiny". *Id.* at 2233; *see also id.* at 2226-27, 2233-34. The Court further observed that the "principle that government . . . cannot in a selective manner impose burdens only on conduct [subject] to the protection of . . . the Free Exercise Clause . . . has parallels in our First Amendment jurisprudence [under the Speech and Press Clause]". *Id.* at 2232.[28] *Church of the Lukumi Babalu Aye* demonstrates that laws selectively restraining the exercise of freedoms guaranteed by the First Amendment, whether they be

[27] In contrast to that generally applicable tax before the Court in *Leathers*, 111 S. Ct. at 1445 ("There is nothing in the language of the [Arkansas] statute that refers to the content of mass media communications"), the theme of the must-carry law is the preferential distribution of the messages of an officially favored class of speaker over a privately owned vehicle of expression and, to that extent, to maintain governmental control over the *content* of those communications delivered via that medium. Nonetheless, the court below held that the "must-carry provisions are [barely] content-related at all" (J.S. App. 20a). The holding contravenes simple reality.

[28] The constitutional command that "Congress shall make no law" is common, and equally applicable, to the Speech and Religion Clauses of the First Amendment. This restraint on legislative power is not dulled because the Congress, in the instant circumstances, has elected to invade the realm of expression rather than that of religion.

of the "religion" or "speech" genre, are facially unconstitutional if not, *inter alia*, shown necessary to achieve a compelling governmental purpose. *See id.* at 2226.[29] In the case of the must-carry restraint, neither the Congress nor the court below has suggested that the law furthers a compelling interest. Absent extraordinary grounds, *ad hoc* incursions by the Congress on the press—especially those that are content-based—are unconstitutional.

The must-carry law extends far beyond those "public funding" cases before the Court in *Regan v. Taxation With Representation Of Washington*, 461 U.S. 540 (1983), and *Rust v. Sullivan*, 111 S. Ct. 1759 (1991), where Congress' authority selectively to underwrite "certain activities it believes to be in the public interest" was affirmed on the ground that " '[a] refusal to fund [constitutionally] protected activity, *without* more, cannot be equated with the imposition of a 'penalty' on that activity' ". *Rust*, 111 S. Ct. at 1772 (quoting *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980) (emphasis added)). Must-carry, of course, is not just the selective appropriation of public funds. It is a great deal "more". *Id.* Must-carry is a content-based "penalty", affirmatively restraining the cable operator's conduct of fully protected communicative activity.

The egregious nature of the must-carry restraint is perhaps best illustrated by the Public Broadcasting Stations who actually argued below, through their trade associations, that because their operations had

[29] If the limitations that the Constitution fixes on the lawmaking powers of government, and the freedoms it guarantees to the people, may be cast aside through the use of labels (*e.g.*, "simply industry-specific antitrust and fair trade practice regulatory legislation" (J.S. App. 13a)), then the First Amendment is little more than rhetoric.

been financed to the extent of billions of dollars of public appropriations, Congress had the further, special warrant to protect the taxpayers' investment by limiting the First Amendment freedoms of other persons. In short, public broadcasting stations, under the laws, now receive from the Government *both* a cash subsidy and a helping-hand by way of a prior restraint on the communicative judgments and activities of third persons; and, understandably, they want to retain both.[30]

While the capacity of government to advance its own speech, or specially to promote that of select persons, is unfettered by the First Amendment, the *one* thing, to that end, that it *may not* do is affirmatively to abridge the protected freedoms of other equally protected speakers. And that, precisely, is the legislative scheme of must carry. The constitutional command notwithstanding, Congress, targeting cable operators and cable programmers, has made a content-based "law . . . abridging the freedom of speech, [and] of the press"; and that enactment, on its face, is unconstitutional.

III. *O'BRIEN*'S INTEREST-BALANCING ANALYSIS IS INAPPOSITE TO FIRST AMENDMENT REVIEW OF LAWS THAT, ON THEIR FACE, LIMIT THE EXERCISE OF "SPEECH" OR "PRESS" FREEDOMS

In *United States v. O'Brien*, 391 U.S. 367, 377 (1968), the Court, reaffirming a four-prong test for review of regulations alleged *incidentally* to restrict

[30] As a matter of constitutional law, the public broadcasters, subject only to the legislature's discretion, are clearly entitled to their appropriations. Equally manifest, the must-carry restraints on the "speech" and "press" freedoms of cable operators and programmers, however beneficial to the public broadcasters or to the commonweal, are unconstitutional.

the exercise of "speech" freedoms, held that a "governmental regulation is sufficiently justified [i] if it is within the constitutional power of the Government; [ii] if it furthers an important or substantial governmental interest; [iii] if the governmental interest is unrelated to the suppression of free expression; [iv] and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to furtherance of that interest." On at least two of these four counts, the must-carry law fails to qualify for an *O'Brien* analysis. At the threshold, the must-carry restraint is not "within the constitutional power of the Government" because, as the district court, itself, held, the law "limit[s] the freedom of cable operators to" distribute what their best judgment says ought to be circulated (J.S. App. 3a). Second, *O'Brien* is inapposite to examination of the must-carry law because it *directly* and *purposefully* restrains communicative activity, thereby *facially*, instead of "incidentally", abridging the exercise of freedoms protected by the First Amendment. *See, e.g., Quincy Cable TV*, 768 F.2d at 1453 ("our examination of the purposes that underlie the must-carry rules, the nature and degree of the intrusions they effect, and prior judicial treatment of analogous regulations leaves us with serious doubts about the propriety of applying the standard of review reserved for incidental burdens on speech").[31]

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[31] That the *O'Brien* standard is typically characterized by this Court as "less stringent," "relatively lenient," or "less demanding" (as in *Texas v. Johnson*, 491 U.S. 397, 403, 407 (1989)), is solely because it is inapposite to review of regulations that facially or selectively limit communicative activity. The very predicate of *O'Brien*, as articulated by the Court, is that the draft-card law there in question "plainly [did] not abridge free speech on its face . . . . [Such law] on its face deals with conduct having no connection with speech." *O'Brien*, 391 U.S. at 375. *Compare O'Brien*, 391 U.S. at 375 ("A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records") *with Johnson*, 491 U.S. at 403 ("If the . . . regulation is not related to expression, then the less stringent standard we announced in *United States v. O'Brien* for regulations of noncommunicative conduct controls. [Otherwise, we must apply] a more demanding standard").

In contrast to that Selective Service law before the Court in *O'Brien*, content-based regulation of the cable television press confronts the express provisions of the First Amendment. Must carry not only targets the cable press to selectively regulate the distribution of speech, the particular means chosen by the Congress to accomplish that questionable goal is facially to abridge the communicative freedoms of persons who publish fully protected expression via cable distribution circuits. That a law having a concededly or presumptively constitutional purpose (*e.g.*, making it a crime knowingly to destroy one's draft card or tax records),[32] and a regulation which facially implicates the First Amendment (*e.g.*, placing content-related restrictions on the distribution of protected speech),[33] are not subject to the same, or even similar, First Amendment analysis, would seem elementary.[34] While

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[32] *O'Brien*, 391 U.S. at 375.

[33] *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

[34] *Compare Tornillo v. Miami Herald Pub. Co.*, 287 So. 2d 78, 82 (Fla. 1973) (where Florida's highest court, faced with the viewpoint-neutral law there at issue, applied considerations of "broad societal interest in the free flow of information to the public" to find the access regulation constitutional)

the former may be justified pursuant to a relatively forgiving interests-balancing test (in which the rival interests are subjectively weighted and valued by the decision-maker), the latter must undergo strict scrutiny.[35]

The proposition that a law crafted to limit the freedoms of speech and press, and a regulation enacted to govern noncommunicative (*i.e.*, "unprotected") conduct (but which, when enforced in a particular circumstance, is "alleged incidentally" to inhibit the exercise of a protected "speech" freedom), are subject to the same deferential examination, not only ignores *O'Brien* and the extensive body of law developed thereunder, but also relegates the First Amendment to an inferior status.[36] The must-carry statute

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with Miami Herald Pub. Co., 418 U.S. at 258 (where this Court, reversing without so much as an allusion to societal interest or principles of rationality, held the State's "access" law *facially* to offend the First and Fourteenth Amendments). Because the Florida law was press-specific and content-based, the Court never found it necessary, or even appropriate, to venture into the morass of whether the *ad hoc* restrictions were intended to advance societal goals.

[35] *See, e.g., Boos v. Barry*, 485 U.S. 312, 319-21 (1988) (content-based, viewpoint-neutral regulation subject to exacting scrutiny). The must-carry law, the only purpose of which is to confer a distribution preference on the speech of certain licensees of television broadcast stations, can hardly be characterized as "neutral"—certainly not in a "speaker" sense. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (The "concept that government may restrict the speech of some elements of society in order to enhance the relative voice of others is wholly foreign to the First Amendment"). Yet, the district court sees only inconsequencial constitutional implication in the law.

[36] *Marbury v. Madison*, 5 U.S. (1 Cranch) at 177 ("The constitution is either a superior paramount law, unchangeable

was not challenged below on the allegation that enforcement of a presumptively constitutional law "incidentally" limits the exercise of First Amendment freedoms. Rather, must-carry was contested on the ground that it *targets and deliberately abridges* the cable operator's freedom of speech; and that thereby, the law *facially contradicts* the First Amendment's command.[37] Whatever question may arise as to the

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by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it . . . . [T]he theory of . . . [American] government must be, that an act of the legislature, repugnant to the constitution, is void").

[37] While the Congress is foreclosed by the First Amendment from making laws that selectively abridge the liberties of speech and press, there is no similar limitation on the enactment of generally applicable laws that, in a particular circumstance, may "incidentally" burden the exercise of those freedoms. For example, the Court has considered many laws, under First Amendment challenge, where the provision itself is facially free of constitutional implication. *See, e.g., O'Brien*, 391 U.S. at 377 (a statute "to raise and support armies"); *Clark v. Community For Creative Non-Violence*, 468 U.S. 288, 290-91 (1984) (regulations to maintain order in public places); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (an ordinance to abate a public nuisance by "control[ing] noise" levels); *United States v. Albertini*, 472 U.S. 675, 689 (1985) (an anti-trespass law to maintain security on military bases); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984) (laws to reduce "visual clutter") ("It is well settled that the state may legitimately exercise its police power to advance aesthetic values."); *Wooley v. Maynard*, 430 U.S. 705, 707 (1977) (quoting N.H. Rev. Stat. Ann. § 262:27-c (Supp. 1975)) (a law to prohibit one from "knowingly [obscuring] . . . the figures or letters on any [automobile license] plate"). The distinguishing feature between the must-carry law and those laws at bar in the foregoing cases (and indeed in *all* of those cases where the Court,

wisdom of, or rationale for, the Government's communicative restraint, there can be no doubt but that the goal and *modus operandi* of the must-carry law is selectively to limit the cable operator's exercise of a constitutionally guaranteed freedom and, thereby, to affect content.[38] No law that is aimed at the press,

confronting First Amendment claims, has applied an interests-balancing test), is that must-carry selectively targets the press with a communicative restriction, thereby facially implicating the First Amendment, while the others do not. In every case where *O'Brien*'s less-demanding test is properly made the standard of First Amendment review, the law under examination is one of general application as well as being presumptively constitutional. *See, e.g., Barnes v. Glen Theatre*, 111 S. Ct. 2456, 2460 (1991) (Indiana "has not banned nude dancing as such, but has proscribed public nudity across the board."); *id.* at 2463-67 (Scalia, J., concurring) (Public nudity is not a right protected under the First Amendment and therefore the challenge does not give rise to a constitutional question.).

[38] *See City of Lakewood*, 486 U.S. at 755-57; *id.* at 774-75 (White, J., joined by Stevens and O'Connor, JJ., dissenting) (facial challenge appropriate only when conduct sought to be regulated is explicitly protected by First Amendment). In *City of Lakewood*, the difference among the justices was confined to the "'technical' question: What is the scope of the peculiar doctrine that governs facial challenges to local laws in the First Amendmnet area?" *Id.* at 773 (White, J., dissenting). Contesting the majority's more expansive view, the dissent urged: "The doctrine . . . applies only when the specific conduct which the locality seeks to license is protected by the First Amendment." *Id.* at 774. Here, there can be no doubt but that the making of communicative judgments by a cable television editor and the distribution of fully protected speech over closed-circuit cables are activities squarely protected by the First Amendment. Thus, whether one follows the rationale of the Court or that of the dissent in *City*

and that so intrusively, selectively, and deliberately restricts activity *fully protected* by the First Amendment, has been justified by this Court on the basis of a "forgiving" or "less demanding" test.[39]

Instead of supervising a nonspeech element of the cable operator's conduct, the must-carry law suppresses the operator's exercise of editorial discretion.[40] Instead of "incidentally" or unintentionally affecting "speech" freedoms, abridgement of those liberties is the *raison d'etre* of the regulation.[41] By the must-carry statute, Congress has purposefully made a "law . . . abridging the freedom of speech, [and] of the press", U.S. Const. amend. I, thereby facially

of Lakewood, content-based regulation of the cable television "press" confronts the First Amendment, is subject to facial challenge and is unconstitutional.

[39] *See Preferred Communications*, 476 U.S. at 496 ("Where a law is subjected to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force").

[40] *Cf. O'Brien*, 391 U.S. at 376 ("on the assumption that the alleged communicative element in [Mr.] O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity"). Thus, while deliberately burning one's draft card (or dancing nude) may well not be "speech" in the constitutional sense, communication over cable television circuits is.

[41] *See Webster's Third New International Dictionary, Unabridged* 1142 (1976) (defining "incidental" as "subordinate, nonessential, or attendant in position or calculation . . ."); *see also Quincy Cable TV*, 768 F.2d at 1450-52. A press-specific, regulation designed to restrain communicative activity, as is the must-carry law, cannot be said to limit the exercise of First Amendment freedoms only incidentally.

overriding the constitutional command and making *O'Brien*'s interests-balancing formula inapposite to its review. Yet, the court below, applying "*O'Brien* and its progeny" (J.S. App. 15a), held the law's confrontation with the First Amendment to be, on balance, benign because must-carry, in its view, is "essentially economic regulation" calculated to produce results in the public interest (J.S. App. 13a). According to the district court, Congress, with one exception (*viz.*, viewpoint supervision), may selectively regulate speech and the press whenever the restriction or burden is accompanied by a plausible finding that the enactment will further a useful governmental interest. That is the paradigm of the "end justifies the means" school of constitutional theory.

O'Brien is not a talisman by which legislators or reviewing judges may make facially unconstitutional laws constitutional. As *O'Brien*, itself, so pointedly recognized, "both the government interest and the 1965 [draft-card law] are limited to the noncommunicative aspect of [Mr.] O'Brien's conduct." *O'Brien*, 391 U.S. at 381-82. Yet *O'Brien*'s forgiving analysis was invoked by the court below to constitutionally justify a law that is aimed at, and purposefully abridges, liberties guaranteed to all of the people. So used, *O'Brien*'s "relatively lenient" or "less demanding" test is made a ready instrument for judicial repeal of the First Amendment. *See, e.g., Reid v. Covert*, 354 U.S. 1, 14 (1957) ("The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written

Constitution and undermine the basis of our Government").

The court below urges the startling proposition that the *O'Brien* standard of First Amendment review was "refined" by this Court's latter opinion in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), so as to expand the interests-balancing test to include review of those laws that facially implicate the First Amendment (J.S. App. 9a; *see also id.* at 19a, 22a-23a). *Ward*, of course, effects no such revolutionary change in the constitutional jurisprudence. Nor does *Ward* suggest, in these circumstances, any relevant departure from the basic parameters of the Court's earlier *O'Brien* decision.

First, *Ward* considered only "the legal standard applicable to governmental regulation of the time, place and manner of protected speech". 491 U.S. at 789; *see also id.* at 798. Neither the district court nor the Congress has suggested that the must-carry restraint is "time, place or manner" regulation. Second, the *Ward* Court repeatedly emphasized that the single purpose of the law before it was "to regulate the volume of amplified music [to protect] those who . . . live [in the] vicinity". *Id.*; *see also id.* at 785, 786, 788, 792, 796 (each reiterating the lone objective of the law—"to avoid excessive noise," *id.* at 795 n.5). Third, *Ward* held that "it can no longer be doubted that government has a substantial interest in protecting its citizens from unwelcome noise." *Id.* at 796 (internal quotation marks and citation deleted). Fourth, *Ward* held that the "limitations on volume" there at issue "ha[ve] no effect on the quantity or content of . . . expression beyond regulating the extent of amplification." *Id.* at 802.

In contrast to that regulation at bar in *Ward*, the must-carry law has a direct, substantial and intentional effect on the make-up of those communications published via the cable television media. It purposefully impacts content by facially discriminating between the comunicative rights and freedoms of a variety of persons (*e.g.*, cable editors, broadcast station licensees, cable programmers, and public viewers) each of whom is presumably entitled to the full and equal protection of the First Amendment.[42] Unlike that "volume control" ordinance in *Ward*, the must-carry law confers greater First Amendment "rights" on a favored few speakers at the reciprocal costs of other, directly affected speakers. It mandates content.

Placing the lid on the lower court's suggestion that *Ward* expands the "less demanding" test of *O'Brien* to include review of laws that openly clash with the First Amendment's command, is the separate opinion of Justice Kennedy (author of the Court's *Ward* opinion), as subsequently rendered in *Simon & Schuster*, 112 S. Ct. at 512-13 (Kennedy, J., concurring):

> [Where] a law is directed to speech alone [,] where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to

[42] If instead of that noise-abatement regulation before the Court in *Ward*, it had been a law giving "local" or "federally-licensed" musicians a substantive preference over their counterparts in the performance or distribution of the musical works, we question whether the Court would have concluded that it was merely "time, place and manner" regulation.

> lawless action, and not calculated or likely to bring about imminent harm the State has the substantive power to prevent [,n]o further inquiry is necessary to [hold the law unconstitutional].

See also id. at 514 (Even a "compelling [governmental] interest" may not sustain a law " 'restrict-[ing] expression because of its message, its ideas, its subject matter, or its content' " (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)).[43] Here, of course, no one—neither the Government nor the private beneficiaries of the special-interests legislation—has suggested that the must-carry restraint is supported by a "compelling" governmental interest that would justify suspension of the First Amendment. In the absence of such a claim, the must carry law exceeds the legislative power of the Congress as limited by the First Amendment, infringes on the guaranteed rights and freedoms of fully protected speakers, and is, on its face, unconstitutional.

[43] *See also Church of the Lukumi Babalu Aye*, 113 S. Ct. 2217 (Kennedy, J., for the Court) (laws selectively restricting the exercise of individual freedoms guaranteed by the First Amendment are facially unconstitutional if not, *inter alia*, shown necessary to further a compelling government interest).

CONCLUSION

The Court should reverse the judgment of the court below, declare the must-carry provisions of the 1992 Cable Act facially unconstitutional, and enjoin enforcement of the law.

Respectfully submitted,

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